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No.

In The

Supreme Court of the United States

October Term, 1994

RONALD B. HIGGINS, SR.; C.M.R.A. INCORPORATED; CMR ASSOCIATES; CYNTHIA HIGGINS; RONALD HIGGINS, JR.; MARCY PAKIZER AND FOREMOST INDUSTRIES, INC.,

Petitioners,

vs.

ROBERT FEGLEY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Rules of Civil Procedure Rule 68 is applicable to Fair Labor Standards Act litigants and, if so, does Rule 68 serve to stop the running of Section 216 mandatory attorney fees and shift costs of same to a plaintiff where a plaintiff's award is *less* than Rule 68 offer?

2. Whether the Fair Labor Standards Act is applicable to partners and, if so, should courts apply the law of partnerships in determine "employee" versus "partner" status of a Fair Labor Standards Act claimant?

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding.

OPINIONS BELOW

The District Court issued three opinions; the first opinion appears as *Fegley v. Higgins, et al.*, 760 F. Supp. 617 (E.D. Mich 1991), Appendix D reproduces it. The second opinion appears as *Fegley v. Higgins, et al.*, No. 89-71819 (unpublished). Appendix C reproduces it. The third opinion appears as *Fegley v. Higgins, et al.*, No. 89-71819 (unpublished). Appendix B reproduces it. Judgment has been entered in District Court. The Court of Appeals' Opinion appears as *Fegley v. Higgins, et al.*, Nos. 92-1771/2086/2164, Appendix A reproduces it.

STATEMENT OF JURISDICTION

The judgment below was rendered and entered on April 26, 1994 by the Court of Appeals for the Sixth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act, 29 U.S.C. §§ 203(e)(1), 216(b) and Federal Rules of Civil Procedure, Rule 68.

Pursuant to United States Supreme Court Rule 14.1(f) the above are set forth verbatim at Appendix F. (46a).

STATEMENT OF THE CASE

This action was commenced by Mr. Fegley in Federal District Court for the Eastern District of Michigan in June, 1990. In his Complaint, Mr. Fegley alleged the Petitioners herein violated Fair Labor Standards Act, (hereinafter referred to as FLSA) 29 U.S.C.

§ 201, *et seq.*, and the Michigan Minimum Wage Act, MCL 408.382, *et seq.*, and as such, owed him back wages.

Respondent moved for summary judgment on liability and on March 1, 1991, the District Court granted Respondent's motion. In its Memorandum and Order, the District Court held, among other things, that Respondent was an employee for the purposes of the FLSA. (Appendix D, 42a).

Subsequently, the case proceeded to a trial on the issue of damages. However, at the outcome of this trial, the District Court effectively overturned its ruling of March 1, 1991, in part, by holding that for time period of January, 1988 to April, 1988, Fegley was *not* an employee but was an incipient partner. As such, the court did not assess any FLSA liability for that time period. (Appendix C, 31a).

Consequently, Judgment was entered for the time period of May, 1988 to August 1989, only in the amount of Three Thousand Eight Hundred Forty Dollars ($3,840.00).plus an equal amount in liquidated damages against Petitioner Foremost Industries, Inc., only. (Appendix C, 32a, 33a).

On June 12, 1992, Respondent filed a Notice of Appeal and on June 15, 1992, Respondent's attorneys filed a Motion for Attorney Fees. Respondent's attorney alleged the case was *factually* extensive claiming he spent 508 hours on the litigation. On June 24, 1992, Petitioners herein responded by informing the court that Respondent had rejected a Federal Rules of Civil Procedure Rule 68 (hereinafter referred to as "Rule 68") offer which *far* exceeded Respondent's award at trial. Ignoring this, the District Court awarded Respondent attorney fees of Forty Thousand Dollars ($40,000.00). (Appendix B, 24a).

Then, on August 25, 1992, Petitioners filed a Notice of Appeal

at the Sixth Circuit Court of Appeals. Briefs were filed and oral argument was presented.

On April 26, 1994, the Sixth Circuit Court of Appeals decided and filed its Opinion which affirmed in part and reversed and remanded in part. (Appendix A, 21a).

A. The District Court's First Opinion

This Opinion was issued in response to cross motions for summary judgment. The court set forth several facts as "not in dispute". At least two of them *were* hotly disputed.

For example, the court found Respondent Fegley was "hired" by CMR. Petitioners vigorously denied this. Also, the court found Respondent worked as an outside service contractor for CMR. (Appendix D, pp. 35a,-39a). Petitioner vigorously denied that.

Both Respondent Fegley and Petitioner Higgins were working together and planned to be equal partners during the time period of January 1, 1988 to April, 1988. Petitioner Higgins always contended Mr. Fegley was his partner, or at best, an independent contractor for CMR.

Despite these factual disputes, the court granted Respondent's Motion for Summary Judgment finding Fegley an "employee" for purposes of FLSA. (Appendix D, 42a).

B. The District Court's Second Opinion

In its second sentence, the District Court states "since the evidence at trial was more detailed than the record on the motion for summary judgment the findings which follow are not altogether consistent with the facts as described in the Memorandum and Order." (*i.e.*, the court's first Opinion). (Appendix C, 28a).

Here, the Court made thirteen (13) factual findings and conclusions of law. These effectively overturned in part the court's findings and order previously entered. (Appendix C, 30a-33a). The court found *no* FLSA liability existed against any Petitioner except Foremost and Higgins and then only for unpaid overtime for the periods of May, 1988, to August, 1989. This finding was based on the testimony of Petitioner and Respondent that they originally worked together, anticipating an equal partnership. This finding was inconsistent with the court's first Opinion.

However, this finding is consistent with what both Petitioner and Respondent testified in their depositions, and at the time of trial, that they were contemplating equal ownership status in the venture at least until August, 1988, when Respondent backed out of the venture and refused to commit his economic investment.

Thus, the court reasoned Respondent Fegley was an incipient partner of Petitioner Higgins during the time period of January, 1988 to April, 1988. Further, the court could not find FLSA liability based on the evidence presented for the time period of January 1988 to April 1988, while he and Petitioner Higgins were planning and setting up their venture.

Consequently, the Court awarded Respondent unpaid overtime of Three Thousand Eight Hundred Forty Dollars ($3,840.00) plus an equal amount in liquidated damages against Foremost and Higgins only for the time period of May 1988 to August, 1989.

C. The District Court's Third Opinion

Shortly after the award, Respondent's attorney made a request for attorney fees pursuant to Section 216(b) of the Act. Petitioners responded by bringing to the court's attention its settlement offers, including an FRCP 68 offer made one year prior to trial, which far *exceeded* the award at trial.

In its Opinion and Orders, the court did not consider the Rule 68 offer as being applicable. Although it noted Respondent's attorney devoted considerable more time to the case than was appropriate, the court nevertheless awarded Respondent a Forty Thousand Dollar ($40,000.00) attorney fee.

The District Court characterized Petitioners' objections and legal arguments to Respondent's attorney fee claim as ignorant of the importance of vindication of national public policy. (Appendix B, 24a).

D. The Sixth Circuit Opinion

The Court of Appeals overruled the District Court finding that Respondent Fegley was a partner. The court's main focus was on the broad policies and intentions of Congress and emphasis was given to the definition of employee as being "the broadest definition that has ever been included in any one Act." (Appendix A, 12a).

In its *de novo* review, the court placed great weight on the breakdown of the partnership agreement between these parties. The court held that because Respondent Fegley reneged on making his capital contribution, he was an employee. (*Id.* at 13a).

In making its ruling, the court agreed with the District Court's first Opinion finding Respondent an employee. Even though Petitioner claimed this was a partnership arrangement, the court did not apply partnership law, rather the court applied an "economic realities" test to determine Respondent Fegley's status as an employee.

Significantly, the court went on to hold that Rule 68 does *not* apply to FLSA. Thus, the court affirmed Respondent's attorney fee award of Forty Thousand Dollars ($40,000.00) as being a reasonable fee. (*Id.* at 20a).

E. Factual Background

Robert Fegley and Ronald Higgins, Sr. worked together at a previous employer. They both left the employer at approximately the same time, early autumn 1987. Respondent Fegley began collecting unemployment compensation and Petitioner Higgins earned a living acting as a job broker. Sometime in November of 1987, Respondent Fegley and Petitioner Higgins began discussions about setting up their own production facility. The parties continued their discussions until early 1988 at which time they began to implement their plans.

Petitioner Higgins was to be the "sales" person, or rainmaker so to speak. Respondent Fegley was to run the manufacturing production operations and was a skilled metal model maker. Petitioner Higgins had the experience and relationships necessary to obtain the business.

Petitioner Higgins was the sole employee of Petitioner CMR, a partnership formed in January 1, 1988. CMR produced nothing. Petitioner Higgins obtained the contracts to provide fabricated prototype parts.

During January 1, 1988, to April 1988, both Fegley and Higgins worked independently and jointly in various ways. Petitioner Higgins obtained several contracts, Respondent Fegley worked on fabricating some of those parts.

Early on in 1988, premises were leased for the purpose of opening the fabrication operations. Both Respondent Fegley and Petitioner Higgins worked together in setting up the new premises and contracting for machinery. The parties agreed that each would contribute $62,500.00 to the new venture. During the period of January to April, Petitioner Higgins contributed financially to the acquisitions of the premises, machinery, etc. Respondent Fegley

did not contribute economically. However, both anticipated Fegley *would* contribute. Neither parties drew a salary although Respondent Fegley was paid for the work he fabricated based upon the contract price. In mid-April 1988, both parties hired employees for the business and opened the fabrications operations. By late May 1988, the business realized sufficient cash flow for each of them to take a salary. Respondent Fegley was not paid hourly, rather he was a salary employee at Seven Hundred Fifty Dollars ($750.00) per week.

Then, in August of 1988, Respondent Fegley decided not to make the capital contribution as had been previously agreed upon. After that, Respondent Fegley continued on as an employee of Petitioner Foremost until April 1989. At this juncture, the relationship between Fegley and Higgins deteriorated and they parted company. Fegley filed the instant action in June, 1990.

Prior to trial, Petitioners twice offered settlement to Respondent in the amount of Ten Thousand Dollars ($10,000.00).

Respondent's attorney *rejected both* offers of settlement. One of them was made on October 30, 1990, pursuant to FRCP 68, one year prior to trial on the issue of damages. (Appendix E, 45a). Then, the day of trial, Petitioner again tried to settle Respondent's claim and offered Respondent Seventeen Thousand Six Hundred Dollars ($17,600.00) to avoid trial. Respondent's attorney *again* rejected that offer.

At trial, the court found Fegley to be a partner with Higgins between January 1988 to April 1988, and accordingly, found no FLSA liability for this period of time, Respondent was awarded Three Thousand Eight Hundred Forty Dollars ($3,840.00) plus an equal amount in liquidated damages for unpaid overtime from May, 1988 to August 1989.

Shortly thereafter, Respondent's attorney requested and was awarded attorney fees in the amount of Forty Thousand Dollars ($40,000.00).

BASIS OF FEDERAL JURISDICTION BELOW

The basis for federal jurisdiction below is 29 U.S.C. § 201, *et seq.*

REASONS FOR GRANTING THE WRIT

The Fair Labor Standards Act was *never* meant to encompass job security for the private practice of lawyers. In 1938, the original Act included a mandatory reasonable attorney fee be paid to a prevailing plaintiff by the defendant. However, at that juncture, only the Secretary of Labor could institute or settle such a claim.

In recent years, costs are litigated and settled under court supervision, not by the Secretary of Labor. In the event this Court would not see fit to grant the writ, every small business would be subject to fatal attack by any disgruntled employee or ex-partner. The plaintiff attorney need only allege a *prima facie* case, refuse *any* offer of settlement, and grind endlessly with discovery in order to realize huge attorney fee awards. The relief provided for by the terms of the FLSA would pale beside the attorney fees generated. A windfall would result.

I.

THE SIXTH CIRCUIT HOLDING IS IN CONFLICT WITH PREVIOUS HOLDINGS OF THE SUPREME COURT.

The Sixth Circuit held that Rule 68 does not apply to the FLSA. This conflicts with the long standing principles of this

Court's holdings as well as those in other Circuits. For example, this Court has consistently admonished courts to give the Federal Rules of Civil Procedure their *plain meaning*. Specifically, this Court has repeatedly stressed that this interpretation applies with full force to Rule 68. Finally, in the context of civil rights litigation, this Court has made it clear that the Rule 68 must not be warped to conform to the demands of Title VII litigation. As such, Rule 68 favors neither plaintiff nor defendant but acts to encourage settlement of *all* civil claims. (Emphasis supplied). *Pavelic S. LeFlore v. Marvel Entertainment,* 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989); *Chesney v. Mareck,* 473 U.S. 1, 105 S. Ct. 3012 (1985); *Martin v. Wilks,* 109 S. Ct. 2180, 104 L. Ed. 2835 (1989). Applying these principles to the case at bar, the text of Rule 68 is to be applied to all civil claims. Thus, as the FLSA is a civil action, Rule 68 absolutely must be applied to the litigants.

From its inception in 1938, FLSA, Section 216(b) provided for the award of attorney fees to a prevailing plaintiff. The court's discretion lie solely in determining what is a "reasonable fee." As one might expect, the reasonable issue is hotly debated and attorney fee awards are all over the board. However, relatively little precedent exists in the application of Rule 68 specifically to the award of attorney fees in FLSA.

Prior to the Sixth Circuit's recent decision in *Fegley v. Higgins, et al.,* Nos. 92-1771/2086/2164, the Fifth Circuit touched upon the issue. In dicta, the Court said a FLSA defendant who made a Rule 68 offer which exceeded the final judgment would cut off the running of attorney fees. *Cox v. Berkshire Grocery Co.,* 919 F.2d 354 (5th Cir. 1990). Although the court acknowledged the Rule's implications to the plaintiff's request for attorney fees, it did not squarely address the issue as it found the offer was *not* a Rule 68 offer. *Id.* at 360.

Similarly, the District Court in *Tyler v. Meola,* 113 F.R.D. 184

(N.D. Ohio 1986), held that Rule 68 applies to FLSA. There, the plaintiff, who *accepted* the Rule 68 offer of judgment, was also entitled to additional costs, which included Section 216(b) attorney fees, up to the point of the offer.

Further, this Court has consistently applied Rule 68 to civil rights plaintiffs' requests for attorney fees. Such precedent is logically analogous to FLSA. Both claims are based upon strong notions of protecting the underdog as well as changing the positions of the parties. Both statutes provide for the award of attorney fees, in part, because they acknowledge the costs of a successful litigation may well exceed the pecuniary benefit to be won.

However, this Court has held that Section 1988 attorney fee awards were not intended to produce windfalls to attorneys. *Farrar v. Hobby,* 506 U.S. __ (1992). Likewise, this Petitioner contends that FLSA attorney fee provisions were never meant to generate attorney fees for plaintiff attorneys and preclude defendant employers from voluntarily settling claims against them. To allow the Sixth Circuit holding to stand would in effect carve out an exception to the strictures which Rule 68 holds on litigants. It would be in direct conflict with the Supreme Court's previous rulings and should not stand.

A. Impact

The FLSA encompasses 80 to 90% of the workers in this country. (*Legal Protection for the Individual Employee*, Finken, Goldman, Summer, page 79). The employers and workers who are exempt from the Act are a distinct minority and probably in danger of extinction.

Thus, the holding of the district and appellate courts as it relates to the Act have a dramatic effect upon workers, employers and on the economic realties of American business and industry.

Legislative history reveals that Congress was well aware of this fact. As such, in legislative debates, one will find much discussion and concern that the overriding policy of the Act not unduly jeopardize economic development nor bring harm to business or that would result in breaking the employer, ultimately causing unemployment and job loss.

Although the 1938 Act provided for the award of attorney fees, there was no private right of action. Thus, this specific penalty provision did not adversely effect employers. Employees pursued their claims through the Secretary of Labor who in turn settled the claims or brought suit. As such, attorney fees were rarely, if ever, awarded.

Later amendments increased the penalties for willful violations and allowed for private right of action. This gave Section 216(b) attorney fee some teeth. However, even then, the Secretary of Labor was involved and most claims were settled under their supervision. As such, attorney fee awards were minimal.

It is the advent of court supervision over plaintiff's claims brought by private attorneys which have led to a disastrous impact of Section 216(b). Further, if Rule 68 is *not* available to the defendant employer, the employer can never settle his claim and mitigate the attorney fee award. The plaintiff has absolutely no incentive to settle short of trial. He has nothing to lose, everything to gain and his attorney fees will be paid by defendant in any event.

The employer is effectively unable to settle the claim until plaintiff's attorney decides to "stop the clock" on the case. Thus, the scenario arises where a defendant employer, who admits liability on all plaintiff's claims, can be financially bludgeoned by astronomical attorney fees as he is without the means to settle the claim. Petitioner submits that is *not* the policy of the Act and

offends the remedial policy of the Act by effectively prohibiting voluntary settlement of claims by an employer.

The Act's statutes and its Amendments were enacted to *facilitate voluntary payment* of employers of the claims against them. This will be impossible for the employer because the real pot of gold lies in the fee award at the close of trial, not plaintiff's wage claim. There is great danger that plaintiff's attorney's overriding concern becomes pumping up his attorney fees. As such, the remedial provisions of the Act are completely lost.

This is illustrated by the instant case. The Petitioner offered Respondent Ten Thousand Dollars ($10,000.00) twice *before* Petitioner ever filed suit, once it was made.aware that Respondent had a FLSA claim. For example, the day Respondent Fegley quit working for the employer and told him he felt entitled to overtime, the Petitioner employer made him an offer of Ten Thousand Dollars ($10,000.00) for payment. Then, when the Petitioner employer received a letter from Respondent's attorney, informing it that there was a FLSA claim, the Petitioner employer again offered Respondent Fegley Ten Thousand Dollars ($10,000.00) to settle the claim. Next, when the Respondent employer received service of process of the lawsuit, it again offered Respondent Fegley Ten Thousand Dollars ($10,000.00) to settle his claim. One year prior to the trial on damages, the Respondent employer made a Rule 68 offer for Ten Thousand Dollars ($10,000.00). Finally, on the eve of trial, Petitioner offered Respondent Seventeen Thousand Six Hundred Dollars ($17,600.00). Respondent and his attorney summarily rejected each and every one of Petitioner's offers. Then discovery began.

The very first piece of discovery was the depositions of Respondent Fegley and Petitioner Higgins. After which Petitioner's attorney embarked upon an excessive discovery campaign which realized nothing more than what both parties testified to at their depositions taken prior to the excessive

discovery. In fact, at the trial, Respondent's case-in-chief consisted of absolutely nothing more than the testimony of Respondent Fegley and Petitioner Higgins. Respondent did not call *one* of the other witnesses listed on Respondent's witness list, nor did it rely on *any* of the information elicited during its discovery campaign. At the close of the trial, a judgment is entered on Respondent's behalf for only Three Thousand Eight Hundred Forty Dollars ($3,840.00) plus liquidated damages.

Shortly thereafter, Respondent's attorney makes a request for 508 hours of attorney fees. Respondent's attorney claimed that a *prima facie* case of FLSA liability entitles him to a complete fee award. The court agreed with Respondent's attorney and awarded him Forty Thousand Dollars ($40,000.00). Petitioner employer never had a chance of settling this case, it was always about attorney fees.

The results are Respondent receives a fraction of what he was offered prior to trial. The fledgling employer is economically devastated. But Respondent's attorney walks away with $40,000.00. A senseless result.

If the precedent set by Sixth Circuit is allowed to stand it will have a significant adverse economic impact on industry and business. The very thing Congress did not intend, a devastation to economic development, will occur.

B. The Error Below Must Be Reversed.

The Sixth Circuit's holdings in the case at bar defy this Court's rulings regarding the Federal Rules of Civil Procedure, specifically Rule 68, and the meaning of "reasonable" attorney fees. To allow such a decision to stand would conflict with the holdings of the principles which this Court has stood fast in *Chesney, Martin and Pavelic S. LeFlore, supra.*

This Court has meticulously directed the lower courts on the application of FRCP 68. The FLSA cannot become a carved out exception to Rule 68 because the Rule plainly applies to *all* civil litigation. This Court cannot allow this very important Rule to be eroded by the Sixth Circuit's ruling.

Moreover, this Court has clearly enunciated the principle of "reasonable" attorney fees on several occasions. This Court has consistently held that where attorney fees are at issue, amongst other factors, the most important factor to be considered is the *results obtained. Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933 (1983). As such, an attorney fee request for Eighty Thousand Dollars ($80,000.00) for a Three Thousand Eight Hundred Forty Dollar ($3,840.00), plus liquidated damages should be found unreasonable per se, especially where Respondent refused to settle for more money prior to trial and did not prevail on all his claims.

Finally, this Court recently and poignantly stated that attorney fee awards under Section 1988 were never intended to produce windfalls to attorneys. *Farrar v. Hobby, supra.*

These guideposts should be adhered to in order to preserve the ability of the courts, attorneys, and the parties to reasonably settle their disputes. If statutes that provide for the award of attorney fees are not properly checked by FRCP 68, as well as guidance from this Court on what is a "reasonable" fee, the results will devastate economic growth, as it leaves the defendant employer helpless and unable to withstand the burden of the fee award.

The FLSA is unique in that the plaintiff's burden is low leaving a high probability of success at trial. The Act mandates attorney fees for plaintiffs (not prevailing defendants), thus providing tremendous incentive for the attorney to take it to trial rather than settle. Plaintiff's attorney can count on being paid. Plaintiff's attorney can embark upon relentless time consuming

discovery tactics to rack up his hours. The defendant, even if he admits liability and concurs in the amount, cannot settle his claim because Rule 68 does not apply to FLSA and plaintiff's attorney will *always* reject the offer. Plaintiff's attorney will recover his fee no matter what. If this Court's guidance regarding a "reasonable" fee is not taken into consideration and Rule 68 does not apply to FLSA, attorney fees become windfalls. Consequently, this Court must reverse the error committee below by the Sixth Circuit's ruling.

II.

FAIR LABOR STANDARDS ACT DOES NOT ENCOMPASS PARTNERS.

The word "employee", however broadly construed means only "employee" and must be circumscribed by meanings reasonably related to that word. By definition, "employee" does not include "partners". *Wheeler v. Hurdman,* 825 F.2d 257 (10th Cir. 1987).

The Tenth Circuit rejected the use of either the "domination" test or the "economic realties" test for use in a bona fide partner situation to determine "employees" versus "partnership" status. *Id.* at 276. The Court reasoned that these tests ignore or unacceptably diminish the essential attributes of a partnership, and are incapable of rational application. The Court further noted that every state that has dealt judicially with the status of "working partners" or "joint ventures" have held they (*i.e.,* the partner) *cannot* be employees. *Id.* at 268.

Similarly, the Fifth Circuit has found that ERISA did not apply to partners. ERISA defines employee exactly the same way that the Fair Labor Standards Act defines employee. *Robertson v. Alexander Grant & Co.,* 798 F.2d 868 (5th Cir 1986).

Despite this trend of the state courts and the Circuits in *not* applying FLSA or ERISA to partners, the Sixth Circuit affirmed the district court's use of the "economic realties" test to determine if Respondent was an employee, not a partner. Essentially, the Court of Appeals summarily dismissed the District Court's second opinion finding Respondent Fegley a partner. The Court of Appeals' only inquiry regarding Respondent's status as a partner was on his failure to make his promised contribution.

The Sixth Circuit application of the Fair Labor Standards Act to working partners, joint ventures, big or small, blatantly disregards the fact that the statute was not meant to include all persons who may perform service for another.

This is illustrated in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851 (1944). This Court, while shaping the economic realties test stated "it cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of "master and servant", as the common law had worked this out in all its variations and at the same time a *narrower one than the entire area of rendering service to others.*" (*Id.* at 124) (emphasis supplied). *See also, Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), holding "the FLSA did *not* intend to stamp all persons as 'employees' *who might work for their own advantage.*" (emphasis supplied).

Thus, to suggest that Congress intended the provisions of the Fair Labor Standards Act to cover all individuals having an economic relationship with a business would make employee status irrelevant. The requirement that the statute cover only employment situations strongly suggests that Congress perceived the need to limit the application of these statutes to employees. *See also, Hishon v. King and Spaulding*, 467 U.S. 69, 79, 104 S. Ct. 2229, 2235 (1984).

Consequently, the Sixth Circuit application of "economic realities" test to partners is in conflict with the Tenth Circuit's holding on the issue. Further, it is not in harmony with the Fifth Circuit's holding that the definition of employee in ERISA does not apply to partners, nor does it harmonize with state law decisions which have held that working partners or joint ventures cannot be employees. Finally, it ignores the guidance of *Hearst* by ignoring the entire legal classifications of partnership law.

A. Impact

The Sixth Circuit holding relative to Respondent Fegley's partnership status has broad implications. The traditional lines drawn between partners and employees allow for the development of economic growth and industrial opportunity to flourish. The American Dream is to create economic independence and opportunity. People who embark upon joint venture to fulfill that dream have for centuries created job, products, services and made significant contributions to the economic growth of our country.

Partnership relationships have unique characteristics, each of which will vary in degree depending on the nature, size and characteristics of the enterprise formed by the partners. As such, Partnership law is firmly embedded ln our jurisprudence. By the time the FLSA was enacted in 1938t the Uniform Partnership Act (UPA) had been adopted by 18 states. By 1984, 48 states several territories and the District of Columbia had adopted the UPA. (*Wheeler* at 267).

Thus, it would be anomalous to ignore the law of partnerships to determine a bona fide partnership, and then subject partners to the purview of the FLSA. To do so would have a detrimental impact on every partnership and joint venture in existence today.

B. Reversal is Mandatory

Courts must apply the longstanding principles of partnership law in determining partnership status. As the Court in *Wheeler* pointed out, to apply the traditional "domination" or "economic realities" test to partnership would result in including virtually every partnership in the United States. (*Id.* at 273).

Further, the use of the traditional tests used to draw the line between employees and general contractors to draw the line between partner and employee, ignores the realities of partnerships and joint ventures.

For example, an entirely different body of statutes and case law applies to partnerships which confers rights and obligations completely different from that of an employee. The day to day realities of partners are significantly different than that of an employee. One of which is the showing of profit and *losses.* In contrast, the employee receives a wage *regardless.* When individuals combine to carry on business as partners, complexities and economic realities exist which are *not* consonant with employee status. (*Wheeler* at 275).

When these relationships disintegrate or break down, partners should be limited to their remedies under the UPA. Disgruntled partners should *not* be able to call themselves an "employee" and make a FLSA claim.

CONCLUSION

The Court should issue a Writ of Certiorari to resolve the conflict with *Mareck*; to ensure an even handled application of Rule 68 to all civil litigation, including the FLSA to resolve the conflict amongst the Circuits regarding the application of "economic realities" test in determining partnership status; to ensure the remedial policies of the FLSA are not extended to partnerships.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A — OPINION IN *FEGLEY V. HIGGINS, ET AL.*, NOS. 92-1771/2086/2164

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0129P (6th Cir.)
File Name: 94a0129p.06

Nos. 92-1771/2086/2164

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT FEGLEY,

Plaintiff-Appellant,
Cross-Appellee,

v.

RONALD B. HIGGINS, SR.; C.M.R.A. INCORPORATED; CMR ASSOCIATES; CYNTHIA HIGGINS; RONALD HIGGINS, JR.; MARCY PAKIZER,

Defendants-Appellees,

FOREMOST INDUSTRIES, INC.,

Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Appendix A

Decided and Filed April 26, 1994

Before: JONES, Circuit Judge; BROWN, Senior Circuit Judge; and WEBER, District Judge.*

BAILEY BROWN, Senior Circuit Judge. Plaintiff Robert Fegley ("Fegley") and defendant Foremost Industries, Inc. ("Foremost") appeal the final judgment of the district court in this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, which awarded plaintiff overtime and attorney fees against Foremost and dismissed Fegley's additional claims and the remaining defendants. We affirm in part, and reverse and remand in part.

I.

Fegley seeks to collect unpaid wages, overtime, and attorney fees under the FLSA. The district judge granted Fegley's motion for partial summary judgment as to liability and allowed the case to go to trial to determine damages only. *Fegley v. Higgins*, 760 F. Supp. 617 (E.D. Mich. 1991). At the bench trial to determine damages, the judge made the following findings of fact and conclusions of law:

> 1. CMR [Associates, a partnership which was incorporated as CMRA, Inc. in June 1988] and Foremost were in the business of fabricating automotive prototype metal parts during the relevant periods in 1988 and 1989. Ronald B. Higgins, Sr. (Higgins), and members

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* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

of his family [son Ronald Higgins, Jr.; wife Cynthia Higgins; and daughter Marcy Pakizer] were the partners of CMR and the stockholders of Foremost.[1] Higgins was manager of CMR and chief executive officer of Foremost. CMR was in business between January and April 1988. Thereafter Foremost continued the business.

2. Prototype parts are fabricated by skilled metal model makers. Manufacturers of automotive parts contract for prototype parts to assess the design of new parts and to make the necessary dies and the like for such new parts.

3. Higgins and Fegley had experience in the fabrication of prototype parts. Higgins had the experience and the relationships necessary to obtain contracts. Fegley was a skilled metal model maker. In late 1987, Higgins and Fegley discussed going into business together. Each was to own one-half of the business. The discussions were general and continued intermittently through April 1988. No agreement was reached because Fegley lacked the necessary funds to contribute to the capital of the proposed business.

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1. The trial judge was inconsistent on whether Higgins was a partner of CMR Associates. *See* 760 F. Supp. at 619. It appears to us, however, that Higgins, although the driving force behind CMR Associates, was not actually a partner of it. In any event, Fegley does not here contend that Higgins was a partner, but does contend that Higgins was liable for his claims for damages.

Appendix A

4. Beginning around January 1, 1988, Higgins obtained several contracts for the fabrication of prototype parts. Fegley agreed to work on the fabrication of these parts knowing that Higgins had no money with which to pay him. Fegley was satisfied to work without pay, believing at the time that he would eventually go into business with Higgins. Fegley and Higgins agreed that if they did not get together in business then Higgins would pay Fegley for his work. No amount was agreed upon. Fegley was required to work no particular hours.

5. Fegley worked intermittently between January and March 1988 on the premises of Westco Metal Craft Co., where Higgins had rented space and facilities. Higgins paid Fegley $1,150 in March 1988, which the parties initially considered a loan. Higgins eventually treated it as compensation and so advised Fegley. Higgins also gave Fegley a set of tires during the period. The tires had a value of $400.

6. Between January and April 1988 Fegley was an incipient partner of Higgins. He anticipated that a business relationship with Higgins would develop. While the Court has previously found that Fegley was an employee of CMR[2] that finding is not sufficient to find

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2. In its earlier Memorandum and Order of March 1, 1991, granting summary judgment as to liability, the court had determined that Fegley was an employee of CMR. *Fegley*, 760 F. Supp. At 622. In this later unpublished opinion, however, the (Cont'd)

that any money is owed Fegley for the work he did during that period. The Court cannot extrapolate from the contracts Fegley worked on his statements and casual observations of third-parties the hours worked and particularly whether Fegley worked more than forty hours in any particular week.

7. In early 1988 Foremost acquired premises in New Baltimore and Higgins began contracting work to be performed on these premises by Foremost. Fegley assisted Higgins in setting up the new premises for fabricating operations.

8. Early in April 1988 Higgins and Fegley agreed that Fegley would go to work full time in the New Baltimore premises as shop foreman for $750 a week. Fegley was first paid for the week ending May 15, 1988 and worked regularly until [Higgins discharged him on] April 1, 1989.

9. The regular work week at New Baltimore ran from Monday to Saturday and covered 56 hours with work on Monday through Thursday from 6:00 a.m. to 4:30 p.m. and Friday and Saturday [sic] from 8:00 a.m to 4:00 p.m. Fegley was aware of this when he agreed to the

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(Cont'd)
court noted that "the findings which follow are not altogether consistent with the facts as described in the Memorandum and Order."

$750.00 per week and generally worked these hours each of the 44 weeks between May 15 1988 and April 1, 1989. No record was kept of the hours Fegley worked.

10. Fegley and Higgins did not discuss overtime. Since Fegley knew the work week was 56 hours and agreed to $750 a week as his compensation his hourly pay was $13.70 an hour. *See Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 109 n.13 (9th Cir. 1975). The Court rejects the reasoning of *Marshall [sic] v. Hendersonville Bowling Center, Inc.*, 483 F. Supp. 510 (M.D. Tenn. 1980) [aff'd, 672 F.2d 917 (6th Cir. 1981)].

11. The only credible evidence regarding the hours Fegley worked is the detailed hours Richert and Roberts worked since Fegley's working hours closely paralleled their working hours. During the forty-hour weeks in which Fegley, Richert and Roberts worked in common, Richert worked 644 hours of overtime exclusive of Sundays and Roberts worked 573 hours of overtime exclusive of Sundays. Fegley did not work Sundays.

12. The best approximation which is all that can reasonably be found of Fegley's overtime hours is determined by averaging the hours of Richert and Roberts. This approximation is 600 hours. Fegley was entitled to an hourly rate for these hours of $20.10. Since he was paid

only $13.70 an hour, he is entitled to $6.40 an hour or $3 ,840 for overtime pay.

13. Foremost's failure to pay Fegley overtime was willful. Foremost made no effort to determine its responsibilities with regard to Fegley. *See Dalheim v. KDFW-TV,* 712 F. Supp. 533 (N.D. Tex. 1989). Fegley is entitled to $3,840 in liquidated damages as a consequence.

Opinion and Order of May 14, 1992.[3]

To clarify three distinct time periods are involved in this lawsuit. During the first period from January 1 to April 11, 1988, Fegley contends he worked for CMR Associates under the direction of Ronald B. Higgins Sr. ("Higgins"). The trial judge awarded no damages for this first period. On appeal Fegley claims that he was entitled to damages for wages and overtime against Higgins and the three partners of CMR Associates.

During the second period from April 11 to May 15, 1988, Fegley contends he labored for Foremost again under the direction of Higgins but did not receive any wages. The trial judge awarded no damages to Fegley for the second period. Fegley avers that he is entitled to judgment against Foremost and Higgins for his work.

Finally during the third period from May 15, 1988 to April 1, 1989, Fegley without dispute worked for Foremost and received

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3. We note that while working for CMR, Fegley collected unemployment compensation. He later returned $5809 in improperly paid unemployment compensation to the Michigan Employment Security Commission.

wages of $750 per week. The trial court found Foremost solely liable for $7,680 in overtime and liquidated damages for this period. Neither party appeals the amount of this award but Fegley contends that Higgins should be jointly liable with Foremost for the damages.

In addition to the award of $7,680 in damages, the judge later awarded Fegley $40,000 in attorney fees and denied the defendants' request for attorney fees. Foremost has appealed the award of attorney fees and Fegley has cross-appealed.

II.

Thus on appeal the parties have raised the following issues:

1. Whether the district court erred in completely dismissing defendants Ronald Higgins Sr.; Ronald Higgins Jr.; Cynthia Higgins; and Marcy Pakizer.

2. Whether the district court erred in refusing to assess damages against Higgins and the partners of CMR Associates for the period from January 1 to April 11, 1988.

3. Whether the district court erred in failing to award damages to Fegley against Foremost and Higgins for the period from April 11 to May 15, 1988.

4. Whether the district court erred in failing to hold Higgins jointly liable with Foremost for overtime for the period from May 15, 1988 to April 1, 1989.

5. Whether the district court erred in determining Fegley was a prevailing party entitled to attorney fees where the damages

award was less than defendants' offers to settle prior to trial; whether the court erred in failing to make all of the defendants liable for the award of attorney fees; and whether defendants are entitled to attorney fees.

III.

Whether the district court erred in completely dismissing defendants Ronald Higgins, Sr.; Ronald Higgins, Jr.; Cynthia Higgins; and Marcy Pakizer.

In awarding damages to Fegley against Foremost for the period from May 15, 1988 to April 1, 1989, the district court dismissed all of the defendants except Foremost without explaining its rationale. Fegley argues that Higgins as well as Foremost should be liable for any judgment for all three time periods because Higgins set up CMR Associates and Foremost made the operational decisions for both and was the president and the only member of the board of directors for Foremost. Further, Fegley contends that Ronald Higgins, Jr., Cynthia Higgins and Marcy Pakizer should be jointly liable for any damages for the first period from January 1 through April 11, 1988 since they were partners of CMR Associates. We agree.

We first consider Higgins. In its first order the district court had stated:

> Where a single person controls and guides several business entities and where that person is the only one who can authorize compliance with the FLSA the individual is subject to joint and several liability. Here, there can be no doubt that CMR, CMRA, and Foremost are all

> creatures of Higgins subject almost entirely to his control. Accordingly, summary judgment on the issue of liability under the FLSA is also GRANTED against Higgins.

Feley, 760 F. Supp. at 623 (citation omitted).

Under 29 U.S.C. § 203(d), the FLSA defines an "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991).[4] We have noted that more than one "employer" can be simultaneously responsible for FLSA obligations. *Id.* The court determines as a matter of law whether a party is an employer using an "economic reality" test. *Id.* " 'The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under FLSA for unpaid wages.' " *Id.* (quoting *Donovan v. Agnew* 712 F.2d 1509, 1511 (lst Cir. 1983)).

Dole is directly on point to the case at hand. In *Dole*, we determined that an individual who was chief corporate officer had a significant ownership interest in the corporation and controlled significant day-to-day functions of the business including determining salaries was personally liable under the FLSA. *Id.* at 966. Similarly, Higgins was chief executive officer of Foremost, had a significant ownership interest in it, controlled significant functions of the business, and determined salaries and made hiring

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4. *See also Martin v. W.E. Monks & Co.*, 805 F. Supp. 500 (S.D. Ohio 1992) (holding majority shareholder who had influence over hiring, firing, and compensation of employee; sometimed assigned work; and spent most of his time managing the business, clearly qualified as "employer" under the FLSA), *aff'd*, 1 F.3d 1241 (6th Cir. 1993) (unpublished).

decisions. Higgins played an equally significant role in running the business of CMR Associates from January through April 1988. He acted as its manager and obtained contracts to make prototype parts. Thus, the district judge clearly erred in determining that Higgins was not liable on the judgment. Higgins will be held jointly liable for all damages assessed upon remand.

We next consider the dismissal of the partners of CMR Associates. Under Michigan law partners are jointly liable for the debts of the partnership. Mich. Comp. Laws § 449.15; Mich. Stat. Ann. § 20.15; *e.g., Lobato v. Paulino,* 8 N.W. 2d 873, 876 (Mich. 1943). We therefore find that Ronald Higgins, Jr., Cynthia Higgins, and Marcy Pakizer are jointly liable for Fegley's damages for the period from January 1 to April 11, 1988 because they were partners of CMR Associates.

IV.

Whether the district court erred in refusing to assess damages against Higgins and the partners of CMR Associates for the period from January 1 to April 11, 1988.

The district court found Fegley to be an "incipient partner" to Higgins during the period in question. It also found insufficient evidence of the hours Fegley had worked during that time. Fegley argues that the law does not recognize the concept of "incipient partnership," and that there was sufficient evidence upon which to calculate the back wages owed to him for the period. Fegley further asserts that it is undisputed that he and Higgins never became partners because he never met Higgins' condition of contributing some $65,000 of capital. In addition, Fegley never shared in profits or management of the businesses. Regarding the sufficiency of the evidence issue, Fegley notes that Higgins and the partnership kept no records of his work from January 1 through April 11, and that he

testified extensively as to his schedule and hours.

A. The Relationship Between Fegley and Higgins

The FLSA is designed to be "a broadly remedial and humanitarian statute." *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143 (6th Cir. 1977). We thus "construe[] the Act's definitions liberally to effectuate the broad policies and intentions of Congress." *Id.* at 144.

Under the FLSA, an "employee" is "any individual employed by an employer."[5] 29 U.S.C. § 203(e)(1). Further, to "employ" is "to suffer or permit to work." 29 U.S.C. § 203(g). Whether a particular situation is an employment relationship is a question of law. *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984). Therefore, we review de novo the trial court's ruling that Fegley was an "incipient partner."

We have noted that where a partnership agreement is executory, "[i]n order to transform it into an executed one, and thus call the partnership into being, it was necessary that the parties do the things that they agreed to do." *Commissioner of Internal Revenue v. Olds*, 60 F.2d 252, 254 (6th Cir. 1932). Partnership agreements are created by implied or express contact. *Id.* Here the parties had agreed that Fegley was to contribute approximately $65,000 to the proposed business. Indeed, the trial court stated in its second order that "[n]o agreement was reached because Fegley lacked the necessary funds." Since Fegley and Higgins did not "do

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5. Senator (later Justice) Black described this as " 'the broadest definition that has ever been included in any one act.' " *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945). *See Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1349-50 (1992) (noting breadth of definitions of "employ" and "employee" under the FLSA as compared to ERISA).

the things that they agreed to do" to form the proposed business, we find that the court erred in determining that Fegley was a partner. Fegley was an employee.[6]

B. Sufficiency of the Evidence

The trial court declared it could not approximate from the contracts Fegley worked on, his statements and casual observations of third-parties the hours worked and particularly whether Fegley worked more than forty hours in any particular week." We find that the court placed too heavy of a burden of proof on the plaintiff.

Addressing the burden of proof for an employee suing for unpaid overtime or wages under the FLSA, the Supreme Court has held:

> [W]here the employer's records [of work hours] are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . we hold that an employee has carried out his burden if he proves he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the

6. Assessing numerous factors, the trial court had previously found that for FLSA purposes, Fegley was an employee rather than an independent contractor. *Fegley*, 760 F. Supp. at 620-622. We agree with that analysis.

> inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946), *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C. Cir.), *cert. denied*, 409 U.S. 1012 (1972); *see Schultz v. Tarheel Coals, Inc.*, 417 F.2d 583, 584 (6th Cir. 1969) (where employees presented evidence of work for which they were improperly compensated, burden shifted to employer " 'to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the . . . evidence.' " (quoting *Mt. Clemens*)). In *Mt. Clemens*, the Supreme Court noted that it is the *employer* who has the responsibility of keeping records of hours under the FLSA. 328 U.S. at 687.

We find the trial court did not use the proper *Mt. Clemens* standard regarding Fegley's burden of showing the hours he worked from January to April, 1988. Defendant Higgins himself testified, for example, that during the period from January to April 1988, at times Fegley worked six or seven days a week, and may have stayed at work some days as late as eight p.m.[7] *Joint App.* at 1019-1020. Under *Mt. Clemens*, then, Fegley had produced enough evidence of his work to shift the burden back to Higgins to show the exact amount of work Fegley performed, or to *disprove*

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7. When asked, "you believe that it was quite possible for Mr. Fegley to have worked 65 hours in at least some of the weeks while he was working there at Westco [the facility where Higgins rented space]?" Higgins responded, "It's possible." *Joint App.* at 1023.

the amount of work performed.[8] Since we determine that Fegley was an employee, we remand to enable the district court to determine Fegley's damages, in accord with *Mt. Clemens*, for the period from January 1 to April 11, 1988. As discussed *supra*, Higgins and the partners of CMR Associates will be jointly liable for these damages.

V.

Whether the district court erred in failing to award damages to Fegley against Foremost and Higgins for the period from April 11 to May 15, 1988.

Fegley claims Higgins admitted that Fegley began working at the New Baltimore shop on April 11, 1988 when Foremost began operations, and was not paid for the work prior to May 15, 1988,

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8. The Supreme Court noted:

> The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of the uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act.

Mt. Clemens, 328 U.S. at 687; *accord Hodgson v. American Concrete Constr. Co.*, 471 F.2d 1183, 1186 (6th Cir.), *cert. denied*, 412 U.S. 949 (1973).

See also Reeves v. International Tel. and Tel. Corp., 616 F.2d 1342, 1352 (5th Cir. 1980) (upholding unpaid wages awarded where employee's estimates of uncompensated hours worked "corresponded to the rough computations of his subconscious mind.", *cert. denied*, 449 U.S. 1077 (1981).

after which time he was paid $750 per week until his termination in 1989. Foremost responds that Fegley presented "no credible evidence to the hours worked during that time period."

Higgins' counsel, however, *admitted* during his opening statement that Higgins owed Fegley for this period:

> THE COURT: First Half of April?
>
> MR. MUSILLI: No work.
>
> THE COURT: Second half?
>
> MR. MUSILLI: Work.
>
> THE COURT: And that was compensated?
>
> MR. MUSILLI: No. That was not compensated. The second half of April was not compensated and the first half of May was not compensated.
>
> THE COURT: *So you still owe him for that?*
>
> MR. MUSILLI: *Absolutely.*
>
> THE COURT: Okay.
>
> MR. MUSILLI: *Absolutely.* And for the type of work that was being done comparable workers were paid anywhere from $8.75 an hour to $13.75 an hour.

Joint App. at 869 (emphasis added).

Appendix A

In discussing the work at Foremost, after it opened for business April 11, 1988, Higgins admitted that "Mr. Fegley started working full time about the same time I did." Higgins stated, "[t]he week of the 18th [of April] I think we [Higgins and Fegley] were there almost all the time during the regular work day"; during several of those weeks Higgins worked "at least 56 hours." *Joint App.* at 1083-1085.

Given these admissions by Higgins and his attorney, the trial court clearly erred in refusing to award unpaid wages to Fegley for the period from April 11, 1988 to May 15, 1988 (five weeks). We thus remand for a determination of the appropriate damages to be assessed against Higgins and Foremost.

VI.

Whether the district court erred in failing to hold Higgins jointly liable with Foremost for overtime for the period from May 15, 1988 to April 1, 1989.

Upon remand the trial court will hold Higgins jointly liable for the $7,680 awarded to Fegley against Foremost for this period. *See supra Part III.*

VII.

Whether the district court erred in determining Fegley was a prevailing party entitled to attorney fees where the award was less than defendants' offers to settle prior to trial; whether the court erred in failing to make all of the defendants liable for the award of attorney fees to the plaintiff; and whether the defendants are entitled to attorney fees.

Appendix A

Professing that the district court erred in awarding Fegley attorney fees, the defendants assert the trial court failed to consider their settlement offers to Fegley, and that since Fegley recovered less at trial than the amount of such offers, Fegley cannot recover attorney fees or costs from the date the offer was made. Defendants also aver that Fegley is not a prevailing party. Further, defendants maintain the award of $40,000 in attorney fees is not reasonable considering the "nominal" damages awarded to Fegley. Fegley contends the award was reasonable and should be affirmed.

An award of attorney fees to a prevailing plaintiff under § 216(b) of the FLSA is mandatory but the amount of the award is within the discretion of the judge. *United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 501 (6th Cir. 1984). We thus determine "whether the lower court abused that discretion by awarding an unreasonable fee." *Id.* Since the FLSA does not discuss what constitutes a reasonable fee "[tlhe determination of a reasonable fee must be reached through an evaluation of a myriad of factors all within the knowledge of the trial court examined in light of the congressional policy underlying the substantive portions of the statute providing for the award of fees." *Id.*

The purpose of the FLSA attorney fees provision is "to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances." *Id.* at 502. Courts should not place an undue emphasis on the amount of the plaintiff's recovery because an award of attorney fees here "encourage[s] the vindication of congressionally identified policies and rights." *Id.* at 503. Indeed we have "upheld substantial awards of attorney's fees even though a plaintiff recovered only

Appendix A

nominal damages." *Posner v. The Showroom Inc.*, 762 F.2d 1010 1985 WL 13108 at *2 (6th Cir. 1985) (unpublished).

Under Fed. R. Civ. P. 68 however entitled "Offer of Judgment" "[i]f the judgment finally obtained by the offeree is not more favorable than the offer the offeree must pay the costs incurred after making the offer." In *Marek v. Chesney*, 473 U.S. 1, 9 (1985) a § 1983 and § 1988 case, the Supreme Court held that where the plaintiff recovered less than the defendant's Rule 68 offer, the plaintiff could not recover attorney fees after that offer in "the underlying statute defines 'costs' to include attorney's fees." Since Rule 68 does not define "costs," "it incorporates the definition of costs that otherwise applies to the case." *Id.* at 9 n.2.

Under § 1988 "the court in its discretion may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs.*" (emphasis added). However the FLSA does *not* include the award of attorney fees as costs; rather "attorney's fee" and "the costs of the action" are expressly separate items under § 216(b):[9]

> The court in such action shall in addition to any judgment awarded to the plaintiff or plaintiffs allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

Therefore a Rule 68 offer does not affect the trial court's award of attorney fees under § 216(b). *See Marek*, 473 U.S. at 13, 43-44 (Brennan J. dissenting) (noting that for *"[s]tatutes that do not refer to attorney's fees as part of the costs* [such as § 216(b) of the FLSA, 473 U.S. at 50]. . . . where an action otherwise is governed by Rule

9. It may be worthy of notice that awards of attorney fees under FLSA § 216 are mandatory, while awards of fees under § 1988 are discretionary.

68 attorney's fees that are potentially awardable under thes statutes are *not* subject to Rule 68 and instead are to be evaluate solely under the reasonableness standard. . . .").

Turning to the amount of the award, we cannot say the distri court abused its discretion in awarding $40,000 in attorney fees t Fegley. We note that this lawsuit furthers the objectives of th FLSA by penalizing an employer who neglected to pay a employee overtime or to even maintain any records of his hou worked; it therefore encourages employer adherence to th mandates of the FLSA in the future.

Defendants further claim they are entitled to attorney fee Under § 216(b), however, "[t]he court in such action shall, i addition to any judgment awarded *to the plaintiff* or plaintiff allow a reasonable attorney's fee *to be paid by the defendant,* an costs of the action." (emphasis added). This section does no provide for plaintiffs to pay attorney fees to defendants; under th plain language of the statute, defendants' argument is meritless.

Considering the fact that Fegley's attorney has expende additional effort upon this appeal, we leave it to the discretion o the district court as to whether to increase the previous award o $40,000 in attorney fees. Foremost Inc., Higgins, Ronald Higgin Jr., Cynthia Higgins, and Marcy Pakizer will all be held liable fo the attorney fees, to be assessed in proportions determined by th district court in its discretion.

VIII.

We AFFIRM in part and REVERSE in part. We AFFIRM th district judge's award of attorney fees to Fegley. However, th district judge may increase this award upon remand and wi

determine what percentage of the award for which each defendant is responsible.

We REVERSE the district court's refusal to assess damages for the period from January 1 to April 11, 1988, and REMAND for a determination of the amount of damages. We REVERSE the district court's determination that Fegley was not entitled to damages for the period from April 11 to May 15, 1988, and REMAND solely for calculation of appropriate damages. Moreover, we REVERSE the dismissals of defendants Ronald Higgins, Sr., Cynthia Higgins, Ronald Higgins Jr., and Nancy Pakizer. The net result is that these four defendants will be jointly liable for Fegley's damages for the period from January 1 to April 11, 1988; and Higgins and Foremost will be jointly liable for Fegley's damages for the periods from April 11 to May 15, 1988 and from May 15, 1988 to April 1, 1989.

APPENDIX B — MEMORANDUM AND ORDER IN *FEGLEY V. HIGGINS, ET AL.*, UNPUBLISHED NO. 89-71819

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

Civil No. 89-71819

ROBERT FEGLEY,

Plaintiff,

v.

RONALD B. HIGGINS, SR., FOREMOST INDUSTRIES, INC., C.M.R.A., INC., CMR ASSOCIATES, a Michigan general partnership and CYNTHIA HIGGINS, RONALD HIGGINS, JR. AND MARCY PAKIZER, Jointly and Severally,

Defendants.

MEMORANDUM AND ORDER

This is a wage hour case. On May 14, 1992 the Court entered judgment in favor of plaintiff for $7,680, representing $3,840 in unpaid overtime and $3,480 in liquidated damages for willful failure to pay overtime against defendant Foremost Industries, Inc. The case against the other named defendants was dismissed. The case was hotly contested. Since it was filed on June 6, 1989 over 100 docket entries have been generated. The Memorandum And Order of March 1, 1991 and Opinion And Order of May 14, 1992 describe the particulars of the case.

Appendix B

Now before the Court are cross-motions for attorney fees. Plaintiff prevailed. Under 29 U.S.C. § 216(b) he is entitled to a reasonable attorney fee. Defendant Foremost Industries, Inc. did not prevail and therefore is not entitled to an attorney fee. While the other defendants prevailed, no authority is cited for the proposition that prevailing defendants in a wage hour case are entitled to attorney fees. Additionally, no effort has been made to allocate defendants' attorney fees.[1]

Plaintiff asks for $40,000 as a reasonable attorney fee. Attached is a schedule displaying the individual attorney charges on which the request is made. As shown, based on individual attorney effort and customary hourly charge the amount expended on plaintiff's case is $89,475-90.[2]

Defendant contests neither the hours nor the hourly charges except to argue the extremely modest result obtained in terms of dollar recovery. The Court likewise notes the extremely modest recovery in light of plaintiff's expectations after trial of $34,790.63 in failed overtime pay and a like amount for willfulness for a total anticipated judgment of $60,581.26.

Plaintiff was given a very difficult time by defendant Foremost Industries, Inc. in pursuing a legitimate claim. Of course, some of plaintiff's difficulties were of his own making because of the manner in which he conducted his affairs. Unfortunately, plaintiff's attorney allowed the sincerity of his belief in his client's cause to out-strip his good judgment, and devoted considerably

1. While defendants' papers mention an offer of judgment under Fed. R. Civ. P. 68 there appears to be nothing in this official file to support the assertion.

2. Attorney hours total 508 with an aggregate charge of $80,413.50. Paralegal hours total 114.2 with an aggregate charge of $9,034.

more time to the case than was appropriate to the facts as finally determined.

Plaintiff recognized this phenomenon by reducing his request for attorney fees to about half of the aggregate fees based upon hours expended and hourly charges. Defendants' objections offer little help to the Court in deciding on the merits of the $40,000 request and ignore the importance of this kind of case in vindication of national public policy. To a considerable extent any attorney fee award in this case is a self-inflicted wound on defendant. The Court is not aware of any real effort on defendants' part to really try to stop the clock running.

While plaintiff's attorneys expended considerably more time than was appropriate to the merits of the case, the reduced request by 50% of the aggregate hourly charge appears reasonable under the circumstances and is recognized as so by the Court.

Plaintiff is awarded $40,000 as a reasonable attorney fee in light of all of the applicable factors and a supplemental judgment in that amount shall be entered by the deputy clerk.

Defendants' motion for attorney fees is DENIED.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED AUG 05 1992
Detroit, Michigan

Appendix B

INDIVIDUAL ATTORNEY CHARGES

MAA

Year	Hours	Rate	Amount
1989	50.4	$150.00/Hr.	$7,560.00
1990	120.7	$165.00/Hr.	19,915.50
1991	236.4	$170.00/Hr.	40,188.00
1992	47.3	$160.00/Hr.	7,568.00
TOTALS	459.2		$75,231.50

Appendix B

INDIVIDUAL ATTORNEY CHARGES

DD

Year	Hours	Rate	Amount
1989	.9	$ 90.00/Hr.	$ 81.00
1990	16.8	$100.00/Hr.	1,680.00
1991	31.1	$110.00/Hr.	3,421.00
TOTALS	48.8		$5,182.00

Appendix B

INDIVIDUAL LEGAL ASSISTANT CHARGES

SJV

Year	Hours	Rate	Amount
1990	20.4	$75.00/Hr.	$1,530.00
1991	93.4	80.00/Hr.	7,472.00
1992	.4	80.00/Hr.	32.00
TOTALS	114.2		$ 9.034.00

APPENDIX C—OPINION AND ORDER IN *FEGLEY V. HIGGINS, ET AL.*, UNPUBLISHED, NO. 89-71819

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL NO. 89-71819

ROBERT FEGLEY,

Plaintiff,

v.

RONALD B. HIGGINS, SR., FOREMOST INDUSTRIES, INC., C.M.R.A., INC., CMR ASSOCIATES, a Michigan general partnership, and CYNTHIA HIGGINS, RONALD HIGGINS, JR., and MARCY PAKIZER, jointly and severally,

Defendants.

OPINION AND ORDER

I.

This is a wage hour case. The background of the case is described in the Memorandum and Order of March 1, 1991 (the Memorandum and Order) granting summary judgment in favor of plaintiff, Robert Fegley (Fegley), on liability. Since the evidence at trial was more detailed than the record on the motion for summary judgment, the findings which follow are not altogether consistent with the facts as described in the Memorandum and Order.

Appendix C

The case was tried to the Court in November and December of 1991. Testifying were Fegley, defendant Ronald Higgins, Jr., fellow employees of Fegley, and several third-parties and fellow employees of Fegley, who observed Fegley at work or who had knowledge of defendants' business operations. Introduced into evidence at trial were a variety of papers from the business records of defendants as well as various calculation of hours worked and amounts allegedly owed. The memories of the witness who testified regarding the hours and days Fegley worked were uncertain and the business records did little to flesh out their testimony. In general, none of the evidence at trial can be given any great weight or was particularly credible except as to Fegley's exhibits 10 and 12, the weekly hours worked by fellow employees Gregg Richert (Richert) and Norman Roberts (Roberts) at defendant, Foremost Industries, Inc. (Foremost), between the week ending April 24, 1988 and the end of March 1989. Since Fegley acknowledged that his work week paralleled closely the work week of Richert and Roberts, these exhibits are highly probative of the hours plaintiff worked for the same period of time. Unfortunately, there was little credible evidence regarding the period January to April 1988 in which plaintiff worked for defendant, CMR Associates (CMR), as described in the Memorandum and Order.

The liability to defendants is modest when compared to the efforts expended by plaintiff to prove his case. However, that result was a risk taken by Fegley when he set about to reconstruct his work history of a time gone by.

II.

Basing on the testimony and exhibits at trial, weighing the evidence and appropriately assessing the credibility of the

witnesses, the Court makes the following findings which constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

1. CMR and Foremost were in the business of fabricating automotive prototype metal parts during the relevant periods in 1988 and 1989. Ronald B. Higgins, Sr. (Higgins), and members of his family were the partners of CMR and the stockholders of Foremost. Higgins was manager of CMR and chief executive officer of Foremost. CMR was in business between January and April 1988. Thereafter Foremost continued the business.

2. Prototype parts are fabricated by skilled metal model makers. Manufacturers of automotive parts contract for prototype parts to assess the design of new parts and to make the necessary dies and the like for such new parts.

3. Higgins and Fegley had experience in the fabrication of prototype parts. Higgins had the experience and the relationships necessary to obtain contracts. Fegley was a skilled metal model maker. In late 1987, Higgins and Fegley discussed going into business together. Each was to own one-half of the business. The discussions were general and continued intermittently through April 1988. No agreement was reached because Fegley lacked the necessary funds to contribute to the capital of the proposed business.

4. Beginning around January 1, 1988, Higgins obtained several contracts for the fabrication of prototype parts. Fegley agreed to work on the fabrication of these parts knowing that Higgins had no money with which to pay him. Fegley was satisfied to work without pay, believing at the time that he would eventually go into business with Higgins. Fegley and Higgins agreed that if

ney did not get together in business then Higgins would pay Fegley for his work. No amount was agreed upon. Fegley was equired to work no particular hours.

5. Fegley worked intermittently between January and March 988 on the premises of Westco Metal Craft Co., where Higgins ad rented space and facilities. Higgins paid Fegley $1,150 in Iarch 1988, which the parties initially considered a loan. Higgins ventually treated it as compensation and so advised Fegley. Iiggins also gave Fegley a set of tires during the period. The tires ad a value of $400.

6. Between January and April 1988, Fegley was an incipient artner of Higgins. He anticipated that a business relationship with Iiggins would develop. While the Court has previously found that 'egley was an employee of CMR, that finding is not sufficient to ind that any money is owed Fegley for the work he did during that eriod. The Court cannot extrapolate from the contracts Fegley vorked on, his statements and casual observations of third-parties ne hours worked and particularly whether Fegley worked more nan 40 hours in any particular week.

7. In early 1988, Foremost acquired premises in New altimore and Higgins began contracting work to be performed on nese premises by Foremost. Fegley assisted Higgins in setting up ne new premises for fabrication operations.

8. Early in April 1988, Higgins and Fegley agreed that Fegley vould go to work full time in the New Baltimore premises as shop oreman for $750 a week. Fegley was first paid for the week ending Iay 15, 1988 and worked regularly until April 1, 1989.

9. The regular work week at New Baltimore ran from

Monday to Saturday and covered 56 hours with work on Monday through Thursday from 6:00 a.m. to 4:30 p.m. and Friday and Saturday from 8:00 a.m. to 4:30 p.m. Fegley was aware of this when he agreed to the $750.00 per week and generally worked these hours each of the 44 weeks between May 15, 1988 and April 1, 1989. No record was kept of the hours Fegley worked.

10. Fegley and Higgins did not discuss overtime. Since Fegley knew the work week was 56 hours and agreed to $750 a week as his compensation, his hourly pay was $13.70 an hour. *See Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 109 n. 13 (9th Cir. 1975). The Court rejects the reasoning of *Marshall v. Hendersonville Bowling Center, Inc.*, 483 F. Supp. 510 (M.D. Tenn. 1980).

11. The only credible evidence regarding the hours Fegley worked is the detailed hours Richert and Roberts worked since Fegley's working hours closely paralleled their working hours. During the forty-four weeks in which Fegley, Richert and Roberts worked in common, Richert worked 644 hours of overtime exclusive of Sundays and Roberts worked 573 hours of overtime exclusive of Sundays. Fegley did not work Sundays.

12. The best approximation, which is all that can reasonably be found, of Fegley's overtime hours is determined by averaging the hours of Richert and Roberts. This approximation is 600 hours. Fegley was entitled to an hourly rate for these hours of $20.10. Since he was paid only $13.70 an hour, he is entitled to $6.40 an hour or $3,840 for overtime pay.

13. Foremost's failure to pay Fegley overtime was willful. Foremost made no effort to determine its responsibilities with regard to Fegley. *See Dalheim v. KDFW-TV*, 712 F. Supp. 533 (N.D.

Tex. 1989). Fegley is entitled to $3,840 in liquidated damages as a consequence.

II.

The deputy clerk is directed to enter judgment in favor of Fegley against Foremost in the amount of $7,680 and a judgment of dismissal with regard to the other defendants.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: MAY 14, 1992
Detroit, Michigan

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MARCH 1, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 89-71819

ROBERT FEGLEY,

Plaintiff,

v.

RONALD B. HIGGINS, SR., FOREMOST INDUSTRIES, INC., C.M.R.A., INC., CMR ASSOCIATES, a Michigan general partnership, and CYNTHIA HIGGINS, RONALD HIGGINS, JR. AND MARCY PAKIZER, Jointly and Severally,

Defendants.

MEMORANDUM AND ORDER

I.

This case involves a claim for unpaid overtime wages under federal and state law. Plaintiff Robert Fegley (Fegley) alleges that he was improperly denied overtime compensation by defendant Ronald Higgins, Sr. (Higgins); the companies run by Higgins, Foremost Industries, Inc. (Foremost) and CMRA, Inc. (CMRA); and CMR Associates (CMR), a general partnership composed of Higgins's wife Cynthia, his son Ronald Jr., and his daughter Marcy

Pakizer. Fegley seeks recovery under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*; under the Michigan Minimum Wage Act, Mich. Stat. Ann. § 17.255(1) *et seq.*; and in quantum meruit.

Now before the Court are the parties' cross motions for summary judgment. Defendants argue that they are not subject to the FLSA because CMR is not an "enterprise," as defined by the FLSA, and because Fegley was employed as an independent contractor.[1] In response, Fegley argues that CMR is merely the predecessor of CMRA, which is clearly an enterprise under the FLSA, and that he was an employee of CMR, CMRA, and Foremost. Based on this argument, Fegley seeks summary judgment on the issue of defendants' liability. Because the Court agrees, Fegley's motion is GRANTED, and the defendants' motion is DENIED.

II.

The following facts are not in dispute.

A.

CMR was a general partnership set up by Higgins to sell automotive prototype parts. The partners in CMR were Higgins's son, Ronald Higgins, Jr.; his wife, Cynthia Higgins; and his daughter, Marcy Pakizer. Although Higgins was not a named partner, he was CMR's principal source of business and a CMR employee. CMR itself produced nothing. Once it successfully bid on a contract, it would send out the work of manufacturing the

1. The provisions of the FLSA and the Michigan Minimum Wage Act relating to the subject matter of the motions before the Court are essentially the same. Therefore, the Court's analysis will focus only on Fegley's FLSA claim.

prototype parts to manufacturing companies and individuals like Fegley, whom defendants refer to as "independent outside contractors."

CMR incorporated in June 1988, becoming known as CMRA, Inc. The general partners in CMR and Higgins became the shareholders of CMRA, Inc. CMRA provided the same services that CMR had provided to companies involved in the production of automotive prototype parts. Both, through the work of Ronald Higgins Sr., obtained contracts to provide fabricated prototype parts.

Higgins incorporated Foremost in January 1988 for the purpose of providing a manufacturing or production company to do production work for CMR and, later, for CMRA. However, Foremost did not begin operations until April 1988 and did not hire employees until May 1988. The shareholders of Foremost are the same as the shareholders of CMRA. Both CMRA and Foremost maintain their company records at the offices of Foremost. CMR, CMRA, Foremost, and Higgins use the same bank and accountant. CMRA and Foremost jointly purchase offices supplies. Higgins is the only member of the Board of Directors for both CMRA and Foremost. He is also the President of both CMRA and Foremost. Higgins and his wife were employees of both CMRA and Foremost in 1988 and 1989. Higgins was responsible for the day-to-day operations of, and made all major decisions for, CMRA and Foremost, including the hiri and firing of employees and selection of outside service contractors.

The companies were further intertwined by loan transactions. CMRA loaned $37,437.77 to Higgins and his wife. Higgins loaned $28,182.12 to Foremost. CMRA loaned $354,676.01 to Foremost. CMRA and Foremost jointly purchased Dick's Polishing, which

handled the buffing of parts for Higgins and Foremost. Higgins loaned Foremost $1500 toward the purchase.

B.

Fegley performed work for CMR between January 1, 1988 and May 31, 1988. He also worked for Foremost between June 1, 1988 and April 3, 1989. Ronald Higgins Sr. personally hired Fegley as an outside service contractor for CMR and as an employee of Foremost.

While fabricating parts for CMR, Fegley received a lump sum payment of $1150 in March 1988. The payment took the form of a personal check made out by Higgins with the notation "loan" written on it. The payment was subsequently reported by CMR to the Internal Revenue Service as income. Fegley has not repaid the money. While working for CMR, Fegley also collected unemployment compensation. He has since repaid the Michigan Employment Security Commission $5809 in improperly paid unemployment compensation. At a later date, Fegley also received a lump sum payment of $400, which he used to purchase automobile tires. CMR kept no records of the time that Fegley worked. According to Fegley, he sometimes worked more than 40 hours per week.

Some of the outside service contractors were paid by CMR or CMRA; others were paid by personal check from Higgins or his wife; and the remainder were paid by Foremost. Each received compensation at a rate negotiated individually with Higgins and was issued an Internal Revenue Service form 1099 as a record of annual income at the end of the year. While working for CMR and CMRA, some outside service contractors also worked for other companies fabricating automotive prototype parts. None of the individual outside service contractors were incorporated. None of

them shared in CMRA's profits. None of them invested in CMRA. None of them determined what type of part to manufacture. Higgins could terminate an outside service contractor whose performance was unsatisfactory.

Between January 1, 1988 and May 31, 1988, CMR arranged to have individual outside service contractors, including Fegley, fabricate and/or finish automotive prototype parts. The outside service contractors performed the same work as the employees of Foremost. Indeed, some of them, like Fegley, eventually became Foremost employees. Some of the outside service contractors worked at home. Others worked at a site arranged by Higgins at Westco Metalcraft, Inc.

The outside service contractors who fabricated prototype parts were given everything needed to make the parts, including the necessary material or semi-finished part and part specifications, except for hand tools. They were paid by the piece. In order to fabricate a part, an outside service contractors would hammer the part into the prescribed shape using a mold and blueprints provided by Higgins. After hammering the part into the proper shape, it was then trimmed with hand tools such as a hammer and tin snips. Higgins arranged to have fabricated parts picked up from the homes of the outside service contractors and taken to other outside service contractors for finishing. CMR paid for telephone charges, legal fees, office supplies, materials, truck rental, and labor incurred in fabricating and finishing the parts.

During the time that Fegley worked for Foremost, all of the metal model makers were paid on an hourly basis except for him. He received weekly compensation of $750, regardless of the number of hours that he worked. Fegley did the same work as the other metal model makers. Foremost kept no records of the hours

that he worked. According to Fegley, some weeks he worked more than 40 hours at Foremost.

III.

A.

The FLSA provides, in pertinent part, that:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise.

29 U.S.C. § 203(s)(2). Based on this language, defendants argue that Fegley cannot state an FLSA claim against either CMR or CMRA. According to defendants, CMR employed only Higgins. Fegley was an independent contractor. Therefore, CMR cannot be liable for unpaid wages. While defendants concede that CMRA might be liable as a successor to CMR, they argue that there is simply no way that the FLSA can apply to CMR. Both sides agree that the test to determine whether an individual may be considered an independent contractor or an employee for FLSA purposes is expressed properly in *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 265 (5th Cir. 1987)(citing *United States v. Silk,* 331 U.S. 704 (1947)). The five factors to be examined when making such a determination are:

> 1) the degree of control exercised by the alleged employer; 2) the extent of the relative

> investments of the employee and employer; 3) the degree to which an employee's opportunity for profit and loss is determined by the employer; 4) the skill and initiative required in performing the job; and 5) the permanency of the relationship.

Halferty, 821 F.2d at 265. However, the five factors should not be mechanically applied but, rather, used as a guide in determining whether the "economic reality" of the situation dictates that a worker is an employee. *Id.*

Upon review of the five factors, the following is clear in this case. First, CMR, through Higgins, exercised extensive control over the fabrication of parts by outside contractors like Fegley. Higgins entered into the contracts for the prototype parts. He procured work space (on occasion), materials, and most tools. He arranged for delivery and polishing of the finished parts. Second, Higgins invested significantly in CMR while outside contractors like Fegley needed only to acquire their own hand tools. Third, Fegley had no control over his own profit or loss; he simply fabricated the parts that were given to him. He had no control over the number or size of the parts contracts negotiated by Higgins. Fourth, while Fegley's job required certain specialized knowledge, a tremendous amount of skill and initiative were not necessary. The work was repetitive piece work. The parts were fabricated according to Higgins's instructions. Higgins checked the parts to make sure that they were made properly. Fifth, although Fegley's position at CMR was analogous to that of an at-will employee, it was no different from his status at Foremost.

In order to assess the economic reality of a worker's situation, as reflected in the five-factor analysis, the Court must consider the dependency of the person upon the business for continued

employment. *Id.* That is, it must determine whether Fegley was so dependent on CMR that he would not have worked but for the opportunity to work with CMR. *Id.* at 268. Defendants argue that Fegley did not exhibit the requisite dependency because CMR was not the primary source of Fegley's income between January 1, 1988 and May 31, 1988. During that time, he received more money in unemployment compensation than he received in compensation from CMR. Defendants further contend that Fegley did not depend on CMR for continued employment in his chosen line of business because he worked in the same business both before and after his relationship with CMR. The Court disagrees. Fegley was able to qualify for unemployment compensation because he had been laid off from work in the same type of business. As a result, his only choice was between unemployment and working for CMR. While other outside contractors may have been employed by more than one parts manufacturer or seller, Fegley was not.

Higgins urges the Court to analogize this case to *Donovan v. Brandel,* 736 F.2d 1114 (6th Cir. 1984), in which the Court of Appeals for the Sixth Circuit held that migrant pickle pickers were independent contractors not subject to the FLSA. However, the facts of this case distinguish it from *Brandel.* In that case, the district court found that Brandel relinquished a significant amount of supervisory control to the migrant workers by allowing them to essentially manage the harvest. *Id.* at 1119. Higgins did not relinquish a similar amount of control here, providing Fegley and the other part fabricators with a mold and blueprints for each part. In addition, the district court in *Brandel* found that the migrant workers could increase their remuneration by proper management of the pickle fields. That is, by harvesting the pickles properly, they would maximize their compensation. *Id.* at 1119. Fegley had no such opportunity. No matter how carefully he fabricated the parts, he could not increase his compensation. Finally, the district court in *Brandel* found that the migrant workers were skilled workers

because they had mastered certain methods of maximizing production and because they supervised their own field labor. *Id.* at 1117-18. Here, there were no methods of maximizing production to be mastered, and, other than Higgins's quality checks, Fegley supervised himself.

The Court also notes that the *Brandel* decision has been criticized by other courts. *See, e.g., Secretary of Labor v. Lauritzen,* 835 F.2d 1529, 1536 (7th Cir. 1987) (holding that migrant pickle pickers were subject to the FLSA). Indeed, Judge Easterbrook's concurrence in *Lauritzen* suggests the adoption of a bright line standard for FLSA cases rather than a balancing of factors. *Id.* at 1545. According to Judge Easterbrook, migrant farm hands should all be treated as employees under the FLSA, "without regard to the crop and contract in each case." *Id.* While the Court does not abandon the test applied in *Brandel* and *Halferty,* it acknowledges the utility of Judge Easterbrook's approach in cases such as this one.

Fegley was clearly a homeworker — except when he worked in a place provided by Higgins, which made his situation even more like that of an employee and even less like that of an independent contractor. As Fegley points out, homeworkers have long been considered to be employees under the FLSA. *See, e.g., Walling v. American Needlecrafts, Inc.,* 139 F.2d 60 (6th Cir. 1943). Following Judge Easterbrook's suggestion, it makes some sense to say that the FLSA should apply to homeworkers, regardless of the type of work and the contract under which they work. Evaluating a worker's economic reality is a fancy way of asking what the worker's job is like. A court need not rely on rote application of a balancing test in order to answer such a simple question. Fegley was a homeworker and should be considered to be an employee of CMR.

Appendix D

As a last gasp argument, defendants assert that Fegley's claims for overtime while employed by CMR are unsubstantiated and must be dismissed. Although the Court agrees that the record contains little other than Fegley's self-serving testimony as to the hours that he worked, that is not enough to grant summary judgment. Defendants' contention that Fegley cannot prove and does not know what hours he worked only shows the existence of a disputed issue of material fact. In order to convince the Court to grant summary judgment, defendants would have to make some showing that Fegley did not work overtime for CMR rather than merely contesting his claim that he did work overtime. They have made no such affirmative showing but will have an opportunity to do so at a trial on Fegley's damages.

B.

Defendants concede that the FLSA applies to Fegley's employment with Foremost. However, they again argue that Fegley's claims for overtime are unsubstantiated and must be dismissed. The Court disagrees. While the number of hours worked by Fegley may be subject to considerable dispute, defendants have not shown that, viewing the facts and all inferences to be drawn from them in the light most favorable to Fegley, *SEC v. Blavin,* 760 F.2d 706, 710 (6th Cir. 1985), that a reasonable jury could not find that he worked overtime hours for which he was not compensated. In particular, the Court finds that the affidavit of Gregg Rickert, Plaintiff's Exhibit T, contains sufficient information to create a genuine issue of material fact necessitating the denial of summary judgment. The affidavit states: "Mr. Fegley worked over 40 hours when the rest of the shop did. With the exception of about six weeks, overtime was worked in each of the weeks from April 1988 . . . until April 1989." This is enough to send the matter to trial on the damages issue.

Appendix D

IV.

Based on the foregoing, Fegley's motion for summary judgment on the issue of liability under the FLSA is GRANTED, except as to defendant Higgins. Before judgment can be entered against Higgins, it must be shown that an alter ego theory permits Fegley to seek judgment against him personally for the wrongs of his companies. Fegley argues that because of Higgins's control over and involvement in CMR, CMRA, and Foremost, he is jointly and severally liable for unpaid wages under the FLSA.[2] The Court agrees.

Where a single person controls and guides several business entities, and where that person is the only one who can authorize compliance with the FLSA, the individual is subject to joint and several liability. *Donovan v. Grim Hotel,* 747 F.2d 966, 972 (5th Cir. 1984). Here, there can be no doubt that CMR, CMRA, and Foremost are all creatures of Higgins, subject almost entirely to his control. Accordingly, summary judgment on the issue of liability under the FLSA is also GRANTED against Higgins.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
United States District Judge

Dated: *MAR 01 1991*
Detroit, Michigan.

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2. Because the Court finds both CMR (and its successor CMRA) and Foremost liable for unpaid wages for the periods from January 1, 1988 to May 31, 1988 and June 1, 1988 to April 3, 1989, respectively, it need not reach the issue of whether CMR and Foremost are a common enterprise for purposes of the FLSA.

APPENDIX E — RULE 68 OFFER

Musilli & Baumgardner, P.C.
24000 Greater Mack
St. Clair Shores, Michigan 48080
(313) 778-0900
Fax (313) 778-1204

Ralph E. Musilli
Walter L. Baumgardner

Elizabeth S. Lopez
Lori M. Henderson

October 30, 1990

Michael A. Alaimo, Esquire
Dickinson, Wright, Moon, Van Dusen & Freeman
800 First National Building
Detroit, Michigan 48226

Re: Fegley vs. Higgins, et al

Dear Mr. Alaimo:

Please take notice that Foremost Industries, Defendant in the above-referenced action, tenders the sum of Ten Thousand Dollars ($10,000.00) as payment in full for any damages the Plaintiff may have sustained. This tender is made as an offer of Judgment, pursuant to the Federal Rules of Civil Procedure, Rule 68.

Please contact me as soon as a decision has been made on the above offer.

Very truly yours,

MUSILLI & BAUMGARDNER, P.C.

s/ Ralph Musilli
Ralph Musilli
RM/lj

APPENDIX F — RELEVANT STATUTES AND RULE

FAIR LABOR STANDARDS ACT SECTION (203)(e)(1)

§ 203. Definitions

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

* * *

Appendix F

FAIR LABOR STANDARDS ACT SECTION 216(b)

§ 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action, Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is

brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)].

* * *

Appendix F

FEDERAL RULES OF CIVIL PROCEDURE RULE 68

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(Amended March 19, 1948; July 1, 1966; Aug. 1, 1987.)